Supreme Court, U. S.
FILED
NOV 14 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

JOSEPH D. BLOCK
PETER P. GARAM
4 Irving Place
New York, New York 10003
Tel. No. (212) 460-2777

Attorneys for Appellant

TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Questions Presented 3

Statement of the Case 4

Summary of Argument 9

ARGUMENT:

Introduction 11

I. The Court of Appeals Erred in Holding That the Commission's Ban Is Not a Content-Based Regulation 12

II. The Commission's Ban Has Not Been Justified by a Sufficient Governmental Interest 17

A. The State's Interest in Protecting the Privacy of the Home From Unwanted Communications Is Not Sufficient to Justify the Prohibition on the Mailing of Messages at the Core of the First Amendment 17

B. The Use of Bill Inserts by Utilities Does Not Compel Customers to Subsidize the Expression of Viewpoints With Which They Disagree 20

PAGE

III. The Commission's Ban Cannot Be Sustained on the Ground That It Extends Only to One Manner of Communication 22

IV. The Court of Appeals Erred in Rejecting Con Edison's Claim That the Commission's Bill insert Ban Is Unconstitutionally Vague 26

CONCLUSION 28

Other Statutory Provisions Involved 1s

TABLE OF AUTHORITIES

Cases:

Adderley v. *Florida*, 385 U.S. 39 (1966) 16

Buckley v. *Valeo*, 424 U.S. 1 (1976) 26

Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 27
Central Hudson Gas & Electric Corp. v. *Public Service Commission of the State of New York*, No. 79-565 (U.S. Sup. Ct., appeal docketed Oct. 5, 1979) 2n
Coates v. *City of Cincinnati*, 402 U.S. 611 (1971) 26
Cohen v. *California*, 403 U.S. 15 (1971) 18, 19-20

Erzoznik v. *City of Jacksonville*, 422 U.S. 205 (1975) 18

First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 12, 13, 17, 26

Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 26
Greer v. *Spock*, 424 U.S. 828 (1976) 15, 16

Hynes v. *Mayor of Oradell*, 425 U.S. 610 (1976) 26

PAGE

Ex parte Jackson, 96 U.S. 727 (1878) 13

Kovacs v. *Cooper*, 336 U.S. 77 (1949) 14, 19
Kunz v. *New York*, 340 U.S. 290 (1951) 27

Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974) 15, 16
Linmark Associates, Inc. v. *Township of Willingboro*, 431 U.S. 85 (1977) 23, 24
Lovell v. *Griffin*, 303 U.S. 444 (1938) 13, 27

Martin v. *Struthers*, 319 U.S. 141 (1943) 19

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 22

Police Department of Chicago v. *Mosley*, 408 U.S. 92 (1972) 13, 14, 17, 22
Public Utilities Commission v. *Pollak*, 343 U.S. 451 (1952) 20

Rowan v. *United States Post Office Department*, 397 U.S. 728 (1970) 19

Smith v. *California*, 361 U.S. 147 (1959) 26
Street v. *New York*, 394 U.S. 576 (1969) 8

Thornhill v. *Alabama*, 310 U.S. 88 (1940) 12

United States v. *O'Brien*, 391 U.S. 367 (1968) 14-15

Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 22, 23

Washington Water Power Co. v. *Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979) 5n

Administrative Decisions: PAGE

Boushey v. *Pacific Gas and Electric Co.*, 10 Pub. U. Rep. 4th 23 (Cal. Pub. Util. Comm'n 1975); Decision No. 85823 (May 11, 1976) 5n

Kootenai Environmental Alliance v. *Washington Water Power Co.*, No. U-1008-95 (Idaho Pub. Util. Comm'n Nov. 12, 1976), *set aside*, 99 Idaho 875, 591 P.2d 122 (1979) 5n

Constitutional Provisions:

United States Constitution:
First Amendment ..... *passim*
Fourteenth Amendment ..... *passim*

Statutes:

28 U.S.C. § 1257(2) 2

Cal. Public Utilities Code § 453(d) 5n

N.Y. Civil Practice Law and Rules, Article 78 6

N.Y. Public Service Law
§ 2, Subd. 10 3
§ 2, Subd. 12 3
§ 4, Subd. 1 3
§ 66, Subd. 1 3
§ 66, Subd. 12-a 3
§ 73 ..... 5n
§ 86 ..... 5n

Other Authorities:

Con Edison, Annual Report, 1978 ..... 4n

R. Stern and E. Gressman, *Supreme Court Practice* (5th ed. 1978) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

Opinions Below

The opinion of the Court of Appeals of the State of New York (J.S. App. 1a-15a)[1] is reported at 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S.2d 30 (1979). The opinion of the New York Supreme Court, Appellate Division, Third Judicial Department (J.S. App. 16a-23a), is reported at 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978). The opinion of the New York Supreme Court, Albany County (J.S. App. 24a-28a), is reported at 93 Misc. 2d 313, 402 N.Y.S.2d 551 (1978). The opinion of the Public Service Commission of

---

[1] "J.S. App." refers to the Appendix filed with Appellant's Jurisdictional Statement. "A." refers to the Appendix filed with Appellant's Brief. "R." refers to the Record on Appeal in the court below.

the State of New York ("the Commission") (J.S. App. 31a-56a) is reported at 17 NY PSC 1-R (1977). The order of the Commission on rehearing (J.S. App. 59a-71a) is reported at 17 NY PSC 17-R (1977).[2]

Jurisdiction

The judgment of the Court of Appeals was entered on May 1, 1979 (J.S. App. 29a-30a). Con Edison filed a timely notice of appeal to this Court with the clerk of the Supreme Court, Albany County, on June 26, 1979 (J.S. App. 72a-74a). The jurisdictional statement was filed on July 27, 1979 and this Court noted probable jurisdiction on October 1, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2).

Statutes Involved

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

[2] The Court of Appeals and the Appellate Division each dealt in a single opinion with the bill insert ban involved in this appeal and with another restriction imposed on utilities by the Commission, a ban on promotional advertising. Review of the ban on promotional advertising in the courts below was obtained by Central Hudson Gas & Electric Corporation, another utility subject to the jurisdiction of the Commission. Central Hudson's appeal from the Court of Appeals' judgment on the promotional advertising issue was docketed on October 5, 1979. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of the State of New York*, No. 79-565. Con Edison's challenge in this Court and in the courts below involves only the validity of the bill insert ban.

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

The February 25, 1977 order of the Commission, the validity of which is involved in this appeal, is not reported and is set forth in the Appendix to the Jurisdictional Statement (57a-58a). In relevant part this order provides:

> All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy.

The Court of Appeals determined that the Commission has statutory authority to regulate the content of billing envelopes (J.S. App. 6a-8a). The provisions of the New York Public Service Law (§2, subds. 10, 12; §4, subd. 1; §66, subds. 1, 12-a) which were held to give the Commission statutory authority to issue the above order appear at the end of this brief at 1s-3s.

Questions Presented

1. Whether the order of the Public Service Commission, insofar as it prohibits utilities from communicating their views to their customers on "controversial matters of public policy" by means of bill inserts, is invalid as a denial of freedom of speech.

2. Whether the words "controversial matters of public policy" as used in the Commission's order are so vague as to deprive appellant of its liberty or property without due process of law in violation of the Fourteenth Amendment.

Statement of the Case

The utility industry performs a vital role in meeting our Nation's energy requirements. It presently confronts several issues which have an important bearing on its ability to carry out this function. Examples of such issues, which are likely to have a significant impact upon utilities and consumers alike, are the use of coal for fuel for power plants to decrease dependency on expensive foreign oil imports, the replacement of investor-owned utility service by government-owned facilities, the use of nuclear power to provide the future needs for electric energy, the need for development of new sources of natural gas, the effect of environmental costs on utility rates, and other similar matters. As can be seen, all of these issues are the subjects of national public debate and it is essential to our democratic process that the free flow of information and ideas on these issues shall remain unfettered if the public is to be fully informed.

Appellant Con Edison provides electric, gas and steam service to more than three and a half million customers in the New York City area.[3] Bill inserts (messages included with bills mailed to customers) are the primary means by which Con Edison communicates its views to its customers on public issues which are important to them as consumers of utility services.[4] Evidence submitted by Con Edison in this case shows that it lacks ample alternative channels for the communication of this information, because other means of communication involve more cost, are less likely to reach Con Edison's customers, and may be less effective (A. 15-18).

[3] *Con Edison, Annual Report, 1978* at inside cover and 38.

[4] Con Edison also uses bill inserts to convey notices required by the Commission's regulations or by law to be sent to its customers, and to communicate information on such topics as new rates, energy conservation, customer service procedures, and safety in the use of the Company's services.

On February 25, 1977, the Commission announced a policy banning the use of bill inserts by utility companies for the purpose of communicating "their opinions or viewpoints on controversial issues of public policy" (J.S. App. 43a).[5] The Commission characterized utility customers as a captive audience and reasoned that "it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism." *Id.* Bill inserts should be confined, the Commission concluded, to conveying "noncontroversial and useful information." *Id.* The Commission implemented its ban on the use of bill inserts by the order involved in this appeal.[6]

Con Edison, several other utilities and the New York State Consumer Protection Board petitioned for rehearing of the Commission's order (R. 62-115, 677-794). In its petition for rehearing Con Edison claimed that the Commission's order violated its freedom of expression secured to it by the First and Fourteenth Amendments to the

[5] The bill insert ban adopted by the Commission is virtually unprecedented in the history of utility regulation. Similar bans have been adopted only in California and Idaho. *Boushey* v. *Pacific Gas and Electric Co.*, 10 Pub. U. Rep. 4th 23 (Cal. Pub. Util. Comm'n 1975); *Kootenai Environmental Alliance* v. *Washington Water Power Co.*, No. U-1008-95 (Idaho Pub. Util. Comm'n Nov. 12, 1976). The order of the California P.U.C. was rescinded upon enactment of a statute incorporating its provisions. *Boushey* v. *Pacific Gas and Electric Co.*, Decision No. 85823 (May 11, 1976); *see Cal. Pub. Util. Code* §453(d) (West Supp. 1979). The order of the Idaho Public Utilities Commission was set aside as being outside the scope of its statutory authority. *Washington Water Power Co.* v. *Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979).

[6] Anyone who knowingly fails or neglects to obey or comply with an order of the Commission may be punished by a fine not to exceed $1,000 for each violation. Every distinct violation of any order shall be a separate and distinct offense, and in case of a continuing violation each day shall be deemed a separate and distinct offense. N.Y. Pub. Serv. Law §§73, 86 (McKinney 1955).

United States Constitution and that the order was void for vagueness (R. 63-77). By order issued July 14, 1977, the Commission rejected these constitutional claims and denied the various petitions for rehearing (J.S. App. 64a-68a).

On November 7, 1977, Con Edison commenced an Article 78 proceeding and actions in Supreme Court, Albany County, to annul, vacate and set aside the Commission's order, to declare the order unconstitutional, and to permanently enjoin its enforcement (A. 2-18). Con Edison's Petition and Complaint included the allegation that by prohibiting Con Edison from using bill inserts to communicate its views on controversial matters to its customers, the Commission's order violated its freedom of expression under the First and Fourteenth Amendments to the United States Constitution (A. 6-7). Con Edison also alleged that the Commission's order was void for vagueness under the Fourteenth Amendment to the United States Constitution (A. 7).

Special Term of the Supreme Court held that the bill insert ban constituted a restriction on speech which was not justified by a compelling state interest. It rejected the Commission's argument that the use of bill inserts represents a subsidized means of presenting the utility's views, since it was conceded by the Commission that the cost of mailing would be the same whether or not the inserts were included with the bills, and the Commission may allocate any increased costs to the proper account (J.S. App. 26a-27a). Special Term also rejected the Commission's captive audience argument, finding that the mailbox is not a constitutionally protected enclave (J.S. App. 27a). Special Term also found that alternate channels of communication involve more cost, are less likely to reach subscribers and may be less effective. *Id.* Finally, Special Term concluded that the Commission's order was unconstitutionally vague (J.S. App. 27a-28a). Judgment in favor of Con Edison was entered on March 6, 1978 (A. 64-68).

Upon the Commission's appeal (A. 69), the Appellate Division, Third Department, reversed the judgment of Special Term and declared the Commission's order to be constitutional (A. 70-71). In its opinion, the majority of the Appellate Division noted that the cost of mailing out bill inserts stating the utility management's views on controversial matters of public policy should not be charged to utility customers, but should be borne by the utility's shareholders. It then concluded that it would be impossible for the Commission to separate out the costs attributable to mailing out bills (an expense chargeable to customers) from the costs attributable to mailing out management statements included in the billing envelopes (an expense chargeable to utility shareholders) (J.S. App. 18a). The majority also concluded that because the Commission's order did not ban Con Edison from using the "usual forms of advertisement," it constituted an "insignificant impingement" on Con Edison's constitutional rights, which it felt was far outweighed by the State's interest in preventing customer subsidy of "management's pamphleteering" (J.S. App. 19a). Finally, the majority held that the Commission's order was not unconstitutionally vague. *Id.* The minority of the Appellate Division found nothing to prohibit the Commission from "proportioning the costs so that the costs attributable to the placing of the bill inserts in envelopes and the mailing of bill inserts would be chargeable to shareholders rather than ratepayers" (J.S. App. 23a). Such an apportionment, the minority concluded, would prevent the subsidizing of management's views through the use of bill inserts. *Id.*

In affirming the order of the Appellate Division, the Court of Appeals recognized that government regulation designed to suppress traditional communicative activity because of its content or potential impact is subject to the most rigorous scrutiny (J.S. App. 8a). The Court of Appeals avoided this strict scrutiny by concluding that the Commission's ban is not a content-based regulation. Though recognizing that the Commission's ban "sweeps within its strictures only those bill inserts treating controversial topics," the court below concluded that such a limitation does not offend the First Amendment if it is applied, as the court below thought was the case here, "in an objective and evenhanded manner" (J.S. App. 11a). The Court of Appeals then concluded that the bill insert ban was a valid time, place and manner restriction, because it viewed the order as content neutral, as supported by a significant governmental interest, and as leaving open alternative channels of expression (J.S. App. 9a-11a). The governmental interest relied on by the Court of Appeals in upholding the Commission's ban is the perceived need to protect the privacy rights of utility customers. The court thought that receipt in the mail of a message stating the utility's view on a controversial matter of public policy might "offend the sensibilities" of some of the utility's customers (J.S. App. 10a). It then approved the Commission's ban on the ground that "[g]overnment need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted upon them." *Id.* The Court of Appeals rejected the vagueness argument properly raised by Con Edison in its notice of appeal (A. 72-73) and in its brief (pp. 28-30) to that court without addressing the issue in its opinion. *See Street* v. *New York,* 394 U.S. 576, 581-85 (1969); R. Stern and E. Gressman, *Supreme Court Practice* §3.27, at 214-15 (5th ed. 1978).

Summary of Argument

The Court of Appeals erred in holding that the New York Public Service Commission's bill insert ban is not a content-based restriction on freedom of expression. On the basis of this erroneous holding, the Court of Appeals improperly treated the Commission's ban as a valid time, place and manner restriction, thereby relieving the Commission of its burden of justifying the ban by showing the existence of a compelling subordinating state interest as required by the decisions of this Court. If the decision of the court below is allowed to stand, it will open the way for large incursions on the protection consistently afforded by this Court to First Amendment rights.

The bill insert ban is content-based because it is specifically directed to communications which express the utilities' views on controversial matters of public policy. It is precisely on these issues that the need for unfettered discussion is the greatest and governmental interference in the free flow of information and ideas is most harmful.

The court below further erred in holding that the Commission's ban is valid because it serves the State's interest in protecting the privacy rights of utility customers in their homes. The court speculated that the bill inserts might inflame or offend the sensibilities of the recipients. This Court has held that the ability of government to shut off discourse to protect others from hearing it is "dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." There is no such showing here. The recipient of a bill insert is free to read it or to discard it unread. This fleeting exposure, wholly within the control of the recipient, is much less intrusive on the privacy of the home

than door-to-door canvassing which this Court has upheld. The applicable principle established by this Court is that the decision as to whether a communication is to be received at home shall be made by the intended recipient and not one for the State to impose upon the entire community. The court below relied on no other governmental interest in support of the Commission's order.

The Court of Appeals also erred in holding that the ban on bill inserts is valid because it extends only to one manner of communication. We read the decisions of this Court as extending the protection of the First Amendment to any restriction on expressive activity based on its content, subject to a showing by the state of a compelling subordinating state interest. It is in cases involving proper time, place and manner restrictions on content-neutral speech that the Court has insisted that inquiry must be made as to the availability of ample alternative channels for communication. Even if this case can properly be viewed as a time, place and manner case, which we believe cannot be done under the decisions of this Court, the ban on bill inserts does not leave open to Appellant ample alternative channels for the communication to its customers of its views on controversial public issues. The uncontradicted evidence in the record establishes that bill inserts are the most effective and least costly means for such communication and involve more autonomy than any alternative.

The Court of Appeals erred in rejecting Appellant's claim that the bill insert ban is unconstitutionally vague. There are no standards to inform the utilities or to guide the Commission in the application of the prohibition, and the Commission's offer to provide advisory rulings, although a recognition of the vagueness, is intolerable censorship.

ARGUMENT

Introduction

By this appeal Con Edison seeks the reversal, on First and Fourteenth Amendment grounds, of the judgment of the New York Court of Appeals upholding an order of the State Public Service Commission prohibiting utilities from using bill inserts to communicate their views on controversial matters of public policy to their customers (J.S. App. 58a). The decision of the court below is not in accord with applicable decisions of this Court. On the basis of its erroneous conclusion that this content-oriented ban constitutes a valid time, place and manner restriction, the court below failed to apply the more rigorous standards, firmly established by this Court, requiring that a content-based restriction on freedom of expression imposed by a state must survive exacting scrutiny, that encroachment cannot be justified upon a mere showing of some legitimate state interest but the interest advanced must be of vital and compelling importance, and that the burden is on the state to show the existence of such an interest. We submit that the application of these standards requires a reversal of the judgment below. An affirmance would greatly diminish the protection consistently afforded by this Court to freedom of expression under the First Amendment.

I

The Court of Appeals Erred in Holding That the Commission's Ban Is Not a Content-Based Regulation.

The fundamental and crucial error underlying the judgment below is the conclusion of the Court of Appeals that the Commission's bill insert ban is not a content-based restriction. It is on the basis of this erroneous conclusion that the Court of Appeals relieved the Commission of its burden of showing the existence of a compelling subordinating interest as required by *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 786 (1978), and the long line of this Court's decisions cited therein.

The bill insert ban is specifically directed to communications which express the utilities' views on controversial matters of public policy. This Court in *Bellotti* reaffirmed the principle that discussion of public issues "is at the heart of the First Amendment's protection." 435 U.S. at 776. As the Court stated:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Id. at 776, quoting *Thornhill* v. *Alabama,* 310 U.S. 88, 101-02 (1940).

Bellotti also made it clear that speech does not lose the First Amendment's protection because its source is a corporation. 435 U.S. at 777. Utilities, no less than other corporations, are entitled to the First Amendment's protection. In *Bellotti* the Court cited with approval several decisions in which restrictions on speech by utilities were invalidated. 435 U.S. at 790 n.29.

None of these established principles is inapplicable here because of the means (bill inserts) chosen by Con Edison to communicate its ideas. This Court has expressly held that "[t]he liberty of the press is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938). And freedom of speech and the press extend not only to the content of communications, but embrace the right of distribution: "[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex parte Jackson,* 96 U.S. 727, 733 (1878). *See also Lovell* v. *Griffin,* 303 U.S. at 452.

These guiding principles of First Amendment protection would mean little if they are permitted to be avoided by the erroneous conclusion that a ban on the expression of views on controversial public issues is not a content-based restriction. The Court of Appeals' error is clearly demonstrated by comparing two of this Court's decisions. *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972), is illustrative of content-based regulations. That case involved the validity of a Chicago ordinance prohibiting picketing within 150 feet of a school during school hours, but excepting "peaceful picketing of any school involved in a labor dispute." In writing for the Court, Mr. Justice Marshall stated:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its sub-

> ject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign.
>
> . . . .
>
> In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation "thus slip[s] from the neutrality of time, place, and circumstance into a concern about content."

Id. at 95-99 (footnote omitted). Because the government discriminated among pickets in terms of their messages, the ordinance was held to be unconstitutional.

Kovacs v. *Cooper,* 336 U.S. 77 (1949), is illustrative of time, place and manner regulations. In that case, this Court upheld municipal regulation of sound trucks on the ground that the ordinance did not restrict "communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers." *Id.* at 89. It applied generally to loud and raucous noises without regard to content.

The ban approved by the court below is a classic example of a content-based restriction. The ban is determined solely by reference to the content of the message. Utility companies are barred from sending controversial messages, even though they involve issues closely related to their business, whereas "noncontroversial and useful" messages are permitted (J.S. App. 43a). As in *Police Department of Chicago* v. *Mosley,* 408 U.S. at 95, "[t]he operative distinction is the message." Moreover, the court below could not justify the bill insert ban by reference to "an important or substantial governmental interest [that] is unrelated to the suppression of free expression," *United*

States v. *O'Brien,* 391 U.S. 367, 377 (1968). As we will discuss later in this brief, the harm perceived by the court below as the justification for upholding the ban is based upon the communicative content of the bill inserts. The decisions of this Court clearly require that the bill insert ban must be categorized as a content-based restriction.

The court below reached a contrary result by concluding that the bill insert ban "does not discriminate against persons of any particular political stripe or prohibit the expression of any one position on a hotly debated issue" (J.S. App. 11a), and that it is applied "in an objective and evenhanded manner." *Id.* What the court is suggesting is that so long as the speech of all parties to a debate is equally suppressed, there is no violation of the First Amendment. Under this approach, the State may suppress debate on any or all public issues, so long as the prohibition is applied in an "evenhanded manner."

The court below relied on *Greer* v. *Spock,* 424 U.S. 828 (1976), and *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974), to reach the conclusion that the Commission's ban is not content-oriented (J.S. App. 11a). We submit that these cases are inapposite here.

First, in *Greer* and *Lehman,* speakers were seeking to obtain forced access to use the government's property for their purposes. The Court rejected these claims because it recognized that the government, as owner of property, maintains a right to control the use of its property. Thus, in *Greer,* the Court held that candidates for political office have no constitutional right to make political speeches on a government military base:

> The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.

424 U.S. at 836, quoting *Adderley* v. *Florida*, 385 U.S. 39, 47 (1966). Similarly, in *Lehman*, the Court held that a municipal transit system may refuse to rent advertising space on its vehicles to candidates for political office:

> In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

418 U.S. at 303.

In sharp contrast, what the State has done in this case is to prevent a corporation from using its own property for the exercise of protected expression.

Second, in *Greer* and *Lehman*, the Court emphasized that the restrictions were applied in an evenhanded manner. In *Greer*, not only Dr. Spock but all others were denied permission to make political speeches at Fort Dix. 424 U.S. at 831, 838-39. In *Lehman*, not only Harry Lehman but all other political candidates were refused advertising space on the city's transit vehicles. 418 U.S. at 300-01.

Contrary to the Court of Appeals' conclusion, the Commission's ban *does* prohibit the expression of one position on hotly debated issues. By its terms the Commission's order prohibits the use of bill inserts "as a mechanism for the dissemination of the *utility's position* on controversial matters of public policy" (J.S. App. 58a; *see also* J.S. App. 43a) (emphasis added). Nor is the restriction applied by the State in an evenhanded manner. The ban applies only to utilities and to no one else (J.S. App. 58a).

The Court of Appeals erred in concluding that the Commission's ban is not a content-based regulation. Its judg-

ment is totally incompatible with the pronouncements of this Court:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.

First National Bank of Boston v. *Bellotti*, 435 U.S. at 784-85, citing *Police Department of Chicago* v. *Mosley*, 408 at 96.

II

The Commission's Ban Has Not Been Justified by a Sufficient Governmental Interest.

The Court of Appeals identified vindication of "the privacy rights of utility customers" as the governmental interest served by the Commission's ban (J.S. App. 9a, 10a). We submit that this does not constitute a sufficient justification to sustain the ban either as a time, place and manner restriction or as a content-based restriction. Because the Commission's ban falls in the latter category, it may be upheld only if the Commission has met its burden of showing that the regulation is needed to further a compelling governmental interest.

A. *The State's Interest in Protecting the Privacy of the Home From Unwanted Communications Is Not Sufficient to Justify the Prohibition on the Mailing of Messages at the Core of the First Amendment.*

The Court of Appeals speculated that a bill insert stating a utility's viewpoint on a controversial topic "is as likely to offend the sensibilities of the recipient as it is to elicit

agreement" (J.S. App. 10a). It then concluded that "[g]overnment need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted upon them." *Id.* Plainly, the purported governmental interest relied upon by the court is directly related to the content of the nessage and, therefore, to the suppression of free expression. *See* pp. 13-14, *supra.*

It is clear that in the circumstances of this case, protection of the customers' privacy interests is not a compelling governmental interest. The insignificant infringement of customers' privacy resulting from exposure to bill inserts is not the kind of interest that can justify the significant restriction of Con Edison's freedom of expression.

In *Cohen* v. *California,* 403 U.S. 15, 21 (1971), this Court established the standard to be applied in cases of conflict between the rights of privacy and free expression:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

See also Erzoznik v. *City of Jacksonville,* 422 U.S. 205, 208-12 (1975). *Cohen* and *Erzoznik* involved alleged invasions of privacy outside the home. Even if we assume that a standard more protective of the right of privacy should be applied in cases involving the home, Con Edison's First Amendment rights should prevail over the customers' privacy rights because the invasion of the privacy of the home on the facts of this case is so insignificant.

A customer who receives a bill insert message on a public issue is not forced to read that message and may discard it as quickly as he or she wishes. This fleeting exposure, wholly within the control of the recipient, can hardly be said to constitute an invasion of "substantial privacy interests . . . in an essentially intolerable manner." The trivial burden of disposing of unwanted mail is insufficient to justify the far-reaching infringement of First Amendment rights approved by the court below.

Moreover, bill inserts are the least intrusive means of communication. They are much less intrusive than doorbell ringing and door-to-door canvassing, which this Court approved in *Martin* v. *Struthers,* 319 U.S. 141 (1943), or communication by telephone.

Finally, the Commission's ban is overbroad. It is a drastic remedy to shut off a means of communication to Con Edison's more than three and a half million customers in order to protect a few customers from momentary exposure to ideas they might not agree with.

In holding that protection of the customers' right of privacy justifies infringement of Con Edison's freedom of expression, the Court of Appeals relied on several of this Court's decisions (J.S. App. 10a). The Court of Appeals misconstrued all of these decisions, for none of them supports its conclusion. *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970), and *Martin* v. *Struthers, supra,* make clear that the decision as to whether a given communication is to be received at home is a judgment for each person to make, not one for the State to impose, as the Commission did here, upon the entire community. In addition, *Rowan* did not involve, as does this case, speech which is at the core of the First Amendment. In *Kovacs* v. *Cooper, supra,* unlike this case, there was no attempt to regulate the content of the communications. *Cohen* v.

California, supra, involved a conflict between the First Amendment rights of speakers and the privacy rights of unwilling viewers outside the home. In holding that the First Amendment rights of speakers prevailed in that context, the Court, as noted above, established a standard the state must meet in order for the right of privacy to prevail, and the State has not complied with that standard here.

The Court of Appeals also relied on *Public Utilities Commission* v. *Pollak,* 343 U.S. 451, 467-69 (1952) (Douglas, J., dissenting), in which reference was made to a "captive audience." There is no captive audience in this case. There is no coercion to read unwanted mail as the recipient is free to discard the utility's message, unread, the minute he or she receives it.

B. *The Use of Bill Inserts by Utilities Does Not Compel Customers to Subsidize the Expression of Viewpoints With Which They Disagree.*

The Commission's Counsel argued in the courts below that the bill insert ban is needed to protect customers from being forced to subsidize the expression of viewpoints with which they disagree. This argument was not relied upon, or even mentioned, by the Court of Appeals, but it was accepted as the justification for the upholding of the ban by the New York State Supreme Court, Appellate Division (J.S. App. 18a-19a).

The Commission was not concerned about this so-called subsidy when it promulgated its ban, and made no reference to it in its opinion (J.S. App. 43a). The subsidy issue merited no more than a footnote in the Commission's subsequent order on rehearing (J.S. App. 67a). More importantly, the Commission's order by its terms imposes a total, unconditional ban on the use by utilities

of bill inserts (J.S. App. 58a). The ban would apply even if the entire cost of the mailing were borne by the utilities' shareholders. That this is the intended effect of the order is shown by the Commission's accompanying Statement of Policy which expresses disapproval of the use of bill inserts to communicate a utility's viewpoint on controversial issues *"even when the stockholder pays for it in full"* (J.S. App. 43a) (emphasis added). Thus, whether or not customers would bear any of the costs is made wholly immaterial by the Commission's order.

In any event, it is undisputed that the sending out of the bill inserts will not cost the ratepayers one cent more than the rates they already pay (J.S. App. 26a-27a). Those rates, as fixed by the Commission from time to time after extensive public hearings, are established to give the ratepayers full value in utility services for the charges imposed. Whether the ratepayers agree or disagree with the messages, they pay nothing for exercising either privilege. The fact that the utilities may incidentally save money by the use of bill inserts, at no expense to the ratepayers, is not detrimental to the ratepayers or the public.

Protection of customers from this so-called subsidy, which costs customers nothing, is not the kind of vital, compelling justification for deprivation of First Amendment rights that has ever been countenanced by this Court and should not be countenanced in this case.

III

The Commission's Ban Cannot Be Sustained on the Ground That It Extends Only to One Manner of Communication.

The Court of Appeals viewed the prohibition on bill inserts with approval because it extends "only to one manner of communication." (J.S. App. 9a). We submit that this view does not comport with the decisions of this Court in a case such as this where the prohibition is based solely on the content of the communication. In *Police Department of Chicago* v. *Mosley*, 408 U.S. at 96, quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), the Court stated:

> *Any restriction* on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." (Emphasis supplied).

Similarly, in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), a case involving a content-based regulation, the Court noted:

> We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means. . . ."

Id. at 757 n.15.

Thus, the Commission's ban on bill inserts cannot be sustained on the ground that it only extends to one means of communication.

The Court of Appeals, however, adverted to this subject again in connection with its holding that the Commis-

sion's ban constitutes a valid time, place and manner restriction (J.S. App. 9a-11a). Under *Virginia Pharmacy Bd., supra,* 425 U.S. at 771, this Court enumerated the essential elements of such a restriction, *i.e.,* it must be justified without reference to the content of the regulated speech, it must serve a significant governmental interest, and it must leave open ample alternative channels for communication of the information. The conjunctive statement of these elements makes it clear that the absence of any one is sufficient to deny validity to a purported time, place and manner restriction on freedom of speech.

For the reasons stated in points I and II above, we submit that the Commission's ban does not fulfill the first two requirements in that it is content-based and is not justified by a significant governmental interest. We further submit that the court below erred in concluding that the ban leaves open "numerous alternative means of communication" (J.S. App. 9a).

In *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 93 (1977), the Court's careful consideration of the availability of ample alternative channels of communication and its finding that the alternatives there involved were "far from satisfactory" clearly demonstrate that this vital element of a time, place and manner restriction must be thoroughly scrutinized. The Court pointed out the relevant factors for analysis in the determination of the adequacy of the alternatives—do they involve more cost and less autonomy, are they less likely to reach persons not deliberately seeking the information, and may they be less effective media for communicating the message.

The court below paid no heed to the *Linmark* guidelines nor to this Court's admonition that if a proscription is

based on content the fact that it applies only to one mode of communication does not transform the case into a time, place, or manner case. *Id.* at 94. In the short paragraph devoted to this issue in its opinion, the court below disposed of the matter by saying that the Commission's ban on bill inserts did not take from the utilities whatever other modes of speech they previously had; that the costs of utilizing these other modes may be higher is not determinative; and that Con Edison wholly failed to demonstrate that it will be effectively precluded from exercising its rights (J.S. App. 9a-10).

The court's first point is merely a restatement of its erroneous view that a restriction on speech is valid if it only extends to one mode of communication. No evaluation was made of the comparable effectiveness of the remaining alternatives. As to its second point, while higher cost alone may not be determinative, certainly consideration should have been given to the record evidence to determine whether the higher costs of the alternatives were of such magnitude as to amount to a prohibition. Finally, we believe the court is in error in casting the burden of proof on Con Edison. Consistent with this Court's repeated insistence that the burden is on the government to justify its restriction on speech by showing a sufficient state interest, we believe the state should have the duty to ascertain, prior to instituting time, place and manner restrictions, that those whose freedom of speech is being infringed have ample alternative channels for the expression of their views.

In the proceedings below Con Edison was the only party to submit evidence on the adequacy of alternative means of communication (A. 15-18). That evidence was specifically addressed to the adequacy of the only alternatives available to Con Edison in light of the *Linmark* guidelines. Those

alternatives are a separate mailing, television time, radio time and newspaper space.

The evidence, not controverted in any respect by the Commission or any other party, compels the conclusion that none of the alternatives is adequate to replace bill inserts. A separate mailing would involve higher costs in postage alone of $210,000 (at 1977 rates) and would be prohibitively expensive. Television is not an effective medium for communicating lengthy messages on complicated subjects. Ordinarily a 60-second spot is the longest Con Edison could obtain and this would not be adequate. Also, costs for just one minute of television time in the New York City area would range from $3,000 to $10,000 depending on the station and the time. Radio advertising is also ineffective for communicating lengthy messages and would not reach a large part of our customers. Newspaper advertising would involve higher costs in excess of $100,000 per message and would be less effective than bill inserts in terms of readership. Bill inserts also provide a greater degree of autonomy than commercial media; they involve no intermediate agent for communication of the message other than the postal service.

The court below erred in reaching the conclusion, despite this evidence, that Con Edison "wholly failed to demonstrate that it will be effectively precluded from exercising its rights" (J.S. App. 10a).

IV

The Court of Appeals Erred in Rejecting Con Edison's Claim That the Commission's Bill Insert Ban Is Unconstitutionally Vague.

It is a basic principle of due process under the Fourteenth Amendment to the United States Constitution that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned* v. *City of Rockford,* 408 U.S. 104, 108 (1972). *See also First National Bank of Boston* v. *Bellotti,* 435 U.S. at 785 n. 21; *Hynes* v. *Mayor of Oradell,* 425 U.S. 610 (1976); *Buckley* v. *Valeo,* 424 U.S. 1, 40-41 (1976); *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971). Moreover, "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California,* 361 U.S. 147, 151 (1959).

The vice of vagueness in the First Amendment area is threefold: (1) it may trap the innocent by failing to provide fair warning; (2) it does not provide explicit standards for those who apply them, thus fostering arbitrary and discriminatory enforcement; and (3) it operates to inhibit the exercise of First Amendment freedoms. *Grayned* v. *City of Rockford,* 408 U.S. at 108-09.

The Commission's ban on the use of bill inserts which express the utilities' positions on "controversial matters of public policy" suffers from all of these vices.

In response to this challenge to the Commission's order in Con Edison's petition for rehearing before the Commission, the answer given by the Commission was that "[i]n the event a utility wishes additional guidance with respect to this matter, it should feel free to seek it. We will resolve

any request expeditiously so that no undue delay will result" (J.S. App. 68a). We submit that this is blatant censorship which cannot be substituted for a clearly defined statement of a prohibition in an attempt to subvert the vagueness doctrine. As this Court stated in *Kunz* v. *New York,* 340 U.S. 290, 295 (1951):

> It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action.

See also Cantwell v. *Connecticut,* 310 U.S. 296 (1940); *Lovell* v. *Griffin, supra.*

There are no standards to guide the Commission's actions. Its future pronouncements, if any, as to which matters are controversial and which are not, will amount to nothing more than arbitrary and subjective applications of a vague standard.

Although this issue was argued in our brief to the Court of Appeals, its opinion does not consider it. We submit that the court erred in its failure to invalidate the Commission's ban on the ground that it is unconstitutionally void for vagueness.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case remanded with directions that the judgment of the Supreme Court, Albany County, be reinstated.

Respectfully submitted,

JOSEPH D. BLOCK
PETER P. GARAM
4 Irving Place
New York, New York 10003
Tel. No. (212) 460-2777

Attorneys for Appellant

November 1979

Other Statutory Provisions Involved

The New York Public Service Law (McKinney 1955 and Supp. 1978-1979) provides in relevant part:

§ 2. Definitions

* * *

10. The term "gas plant," when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the manufacture, conveying, transportation, distribution, sale or furnishing of gas (natural or manufactured or mixture of both) for light, heat or power, but does not include property used solely for or in connection with the business of selling, distributing or furnishing of gas in enclosed containers.

* * *

12. The term "electric plant," when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.

* * *

§ 4. The public service commission

1. There shall be in the department of public service a public service commission, which shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry

out the purposes of this chapter. The commission shall consist of five members, to be appointed by the governor, by and with the advice and consent of the senate. A commissioner shall be designated as chairman of the commission by the governor to serve in such capacity at the pleasure of the governor or until his term as commissioner expires whichever first occurs. No more than three commissioners may be members of the same political party unless, pursuant to action taken under subdivision two, the number of commissioners shall exceed five, and in such event no more than four commissioners may be members of the same political party.

• • •

§ 66. General powers of commission in respect to gas and electricity

The commission shall:

1. Have general supervision of all gas corporations and electric corporations having authority under any general or special law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality for the purpose of furnishing or distributing gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, and all gas plants and electric plants owned, leased or operated by any gas corporation or electric corporation.

• • •

12-a. Have power to fix and alter the format and informational requirements of bills utilized by public

and private gas corporations, electric corporations and gas and electric corporations in levying charges for service, to assure simplicity and clarity and to require indication of any adjustment charges, including but not limited to fuel adjustments, in monetary amounts. The commission shall further ensure periodic explanation of applicable rates and rate schedules for the purpose of assisting customers in making the most efficient use of energy.